IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2021/CLE/gen/00205

BETWEEN

LASHAN BUTLER

Claimant

AND

DARVILLE WONG REALTY

Defendant

Before: The Honourable Madam Justice Simone I. Fitzcharles

Appearances: Ms. Rhchetta Godet for the Claimant

Mr. Rouschard Martin for the Defendant

Hearing Date: Heard on the papers

RULING

FITZCHARLES J:

[1] This ruling concerns two interlocutory applications which have arisen within the context of a construction dispute. In that dispute, the Claimant, Lashan Butler, seeks from the Defendant, damages in the sum of $112,000.00 and other reliefs for breach of a contract dated 26 February 2015 to construct a single family dwelling home on Lot #7 Killarney Shores Subdivision on the island of New Providence in the Commonwealth of The Bahamas (the "Construction Agreement").

[2] The first application is by Summons of the Defendant filed on 21 April 2023 to strike out the Amended Writ of Summons and Statement of Claim in this action. The Defendant's application is supported by the Affidavit of Carlton Martin filed on 26 September 2023. The grounds of the application are stated by the Defendant as follows:

> "1. the action was commenced or issued against the wrong Defendant such Defendant not being party to any contractual dealings with the Plaintiff, particularly the written construction contract of the 26th February 2015;
>
> "2. there is no cause of action against the Defendant (Darville Wong Realty by apparent amendment) who is a non-entity that cannot enter into a contract, or Darville Wong Realty Limited who is not a party to the 26th February 2015 construction contract;
>
> "3. the Plaintiff admitted in paragraph 2 of her Statement of Claim that her contractual dealings regarding construction of her house was with Darville Construction and Property Management Limited whom the said non-entity cannot use to do business…[as it is not] a separate legal personality;
>
> "4. the Plaintiff's action is frivolous, vexatious and an abuse of the process of the Court."

[3] The second application is brought by the Claimant by Notice of Application filed on 05 July 2023. This application is supported by the Affidavit of Lashan Butler filed on 27 July 2023 and the Second Affidavit of Lashan Butler filed on 13 October 2023.

[4] The Claimant resists the Defendant's effort to strike out her case on the basis of the Defendant's conduct. Specifically, it is argued, the Defendant and/or other parties have at all times held themselves out to the Claimant as 'Darville Wong Realty'. As such, the Claimant submits that the action ought not to be dismissed. Further or alternatively, the Claimant asks that the Court allow the amendment of the Amended Writ and Statement of Claim so as to reflect the name of 'Darville Wong Realty Limited', Darville Construction & Property Management Limited and Gregory Ndlovu as Defendants.

The Proceedings

[5] The matter was commenced by Writ of Summons filed on 26 February 2021 which was subsequently amended without leave and before service on the Defendant. The action was originally brought against the 1st Defendant, Darville Wong Realty Limited and a 2nd Defendant, Wellington Woods (doing business as Wellington Woods & Associates Ltd.). In the Amended Writ filed on 16 November 2021, the word "Limited" was deleted from the name of the 1st Defendant and the 2nd Defendant was eliminated altogether. As such, at the time Darville Wong Realty Limited was served with the originating process, there was only one Defendant listed in the pleadings – Darville Wong Realty.

[6] Amendments were shown in red ink in the Amended Writ of Summons, save for the word 'Limited' which, instead of being struck through by a red line, was simply deleted from the name of the Defendant 'Darville Wong Realty' wherever it appeared in the Amended Writ of Summons. The Amended Writ of Summons and the Statement of Claim were filed and served on 17 November 2021 on the registered office of Darville Wong Realty Limited, Messrs Bowe Partners & Associates Corporate Services of Caves Village, Building 4, Nassau, New Providence, The Bahamas. At that time, Messrs Bowe Partners & Associates Corporate Services were also served for the Defendant with the original Writ of Summons which showed the document as first filed without the amendments. The Defendant therefore had both pre-amendment and post amendment documents to compare.

[7] By Attorneys, Martin Global Law who represent Darville Wong Realty Limited, the Defendant answered the claim by unconditionally entering its Memorandum of Appearance on 25 November 2021. By that document the Defendant as Darville Wong Realty required the following of the Supreme Court:

"*PLEASE ENTER an Appearance on behalf of the Defendant in this Action.*"

[8] Further, on 21 December 2021, the Defendant again via its Attorneys, Martin Global Law, entered its Defence and advanced a Counterclaim against the Plaintiff. On 3 February 2022 the Plaintiff filed her Reply and Defence to Counterclaim.

[9] The Case Management conference took place on 13 October 2022. Neither of the interlocutory applications now before the Court were at that time foreshadowed or filed. The trial was to commence on 22 May 2023. The Court eventually found it necessary to adjourn the trial for the hearing of the Defendant's interlocutory application and to give directions for the filing of the evidence. The timing of the filing of these interlocutory applications, the lack of evidentiary support and the nature of the relief sought were driving factors which made the Court decide to put the trial off until after the applications are heard. The Court considered that a bid to strike out the Plaintiff's case and/or amend the pleadings to add parties, if successful, clearly could affect the timing and composition of the trial or whether it would take place at all. After partially hearing the parties, on the

first application and giving further directions, I decided to complete the hearing on the papers.

Pleadings and Evidence

[10] In her Statement of Claim, the Claimant alleges that Darville Wong Realty doing business as Darville Construction and Property Management Limited entered into a contract with her to construct a dwelling house on Lot 7 in Killarney Shores Subdivision. The contract price was $172,000 which was to be paid in stages by a mortgage loan taken out by the Claimant. The work was estimated to be completed within 180 days from 16 April 2015, resulting in an estimated completion date of 12 September 2015.

[11] The Claimant pleaded that throughout the course of the work under the Construction Agreement the Defendant was gravely behind its agreed timelines and the Claimant faced the possibility that the loan provider would withdraw the loan facility. The construction work proceeded well beyond the 180-day estimated timeline into 2017. The Claimant then alleges that in or about early July 2017, she was told by a representative of the Defendant, Gregory Ndlovu, that they were unable to complete the work. As a result of the Claimant's retention of an appraiser to assess the progress of the work and cost to complete, she pleaded that on 17 July 2017 she learned that the Defendant negligently and in breach of contract carried out defective work and failed to complete works after having been paid for it. She alleges that overall only 85% of the work was completed in the contract.

[12] The Claimant pleaded that she tried to get the Defendant to complete the works under the Construction Contract to no avail. She claims that she suffered loss of materials and was left with the Defendant's defective work. She further pleaded that she received a written communication dated 1 November 2017 from Darville Construction & Property Management Limited which was signed by Gregory Ndlovu to the effect that neither that company nor its partners will any longer "be affiliated" with the Claimant's project. As such, the Claimant pleaded that the Defendant repudiated the Construction Agreement and, for the loss she sustained thereby, that she is entitled to special and general damages as set out in her Statement of Claim.

[13] Darville Wong Realty Limited filed a positive defence on 21 December 2021 to the Claimant's Statement of Claim. In its Defence, it alleged that the Claimant was responsible for the delays in the construction project. The Defendant also advanced a Counterclaim for:

1) "$34,400 for work completed on the 5th stage and final stage [of the construction]
2) $17,200 for loss of opportunity and $8,600 for loss of retention fee
3) Damages to be assessed
4) Interest …
5) Costs…"

[14] It is key to these applications that in the Defence, the Defendant denied inter alia that Darville Wong Realty did business as "Darville Construction and Property Management Limited". It is averred by the Defendant that the Plaintiff accepted and executed the Construction Agreement "with and under the rubric of Darville Wong Realty". Further, the Defendant pleaded that Mr Ndlovu was not its agent and did not have authority to make certain statements on behalf of the Defendant, which the Claimant pleaded Mr Ndlovu had made.

[15] Materially, in the Second Affidavit of Lashan Butler filed on 13 October 2023, Ms Butler stated in part:

1) "Mr Ndlovu signed the contract [the Construction Agreement] on behalf of the Defendant (tab 1 of the Plaintiffs Bundle of Documents).

2) "Mr Ndlovu also purported to cancel the said contract between Darville Wong Realty and myself by a [letter] dated 1st November 2017 which letter was signed by him on behalf of the Defendant. Contrary to all documentation previously exchanged between the parties, the letter was sent by Darville Construction & Property Management Limited (tab 13 of Plaintiffs Bundle of Documents)…

3) "The same letter also requested that inquiries be sent to 'loancoach 1@gmail.com'. This email address is in fact the email address of Mr Ndlovu. (Tab 8 of Plaintiffs Bundle of Documents).

4) "Darville Wong Realty Limited is a 'Company' that advertises as "Darville Wong Realty" (the Defendant). Attached hereto as Exhibit 1 is a copy of the Company Profile.

5) "Darville Wong Realty has a logo which is the same [that of] as Darville Wong Realty Limited. Further, the letter from Darville Wong Realty from my Bundle of Documents has the same logo as the aforementioned Company. Attached hereto as Exhibit 3 are copies of the logos.

6) "Christopher E Darville, also referred to as Chris Darville, and William Utoy Wong are listed as Agents of this Company on their website and LinkedIn pages. The page specifically states that these persons are the founder of the "Company" Darville Wong Realty. Attached hereto as Exhibit 4 are copies of the pages.

7) "By letter from Darville Wong Realty and signed by Gregory Ndlovu dated 6 April 2016 the Claimant was advised that money was received by Mr Ndlovu of Chris Darville Realty…the said letter also using the logo of Darville Wong Realty and Darville Wong Realty Limited evidencing the connection between the Companies (tab 8 of the Plaintiffs Bundle of Documents).

8) "Additionally, the information listed online for Darville Construction and Property Management Limited is the same as their Website and Facebook pages for Darville Wong Realty, "darvillewongrealty.com". Further Gregory Ndlovu's email as mentioned ...above is listed on the Facebook page of the company as the contact email for Darville Construction and Property Management Limited. Attached hereto as Exhibit 5 are copies of the pages.

9) "The court made an Order dated 26 June A.D. 2023 that the Finance Corporation of the Bahamas Limited (RBC Finco) produce the bank stubs, receipts and any other documentation verifying payments for the stage construction for my home...

10) "The information provided shows that all cheques for the stage payments for the construction of my home were made out to Darville Wong Realty. Attached hereto as Exhibit 7 are copies of the Bank Stage Payments."

[16] In the case for the Defendant, the Court considered the Affidavit of Carlton Martin of the law firm of Martin Global. It is an 18-paragraph document and of these paragraphs, save for the 2 opening sentences of paragraph 4, the first sentence of paragraph 6 and arguably paragraph 11, the Affidavit abounds with opinion, argument and legal conclusions, which typically ought to be placed in legal submissions. Fortunately for the Defendant, Counsel echoed the main points of these arguments in written submissions.

[17] I briefly remind Counsel that, as is the case with Order 41 Rule 6 of the former Rules of the Supreme Court ('RSC'), Part 30 Rule 3 of the Supreme Court Civil Procedure Rules 2022 empowers the Court to order that any irrelevant matter be struck out of any affidavit. In discussing challenges to affidavit evidence under the RSC, Lyons J in **Wilmington Trust Company Limited (as Trustees of the McMillan Trust) v Rawat et al** [1991] BHS J No 42 stated in part:

> "...
>
> "(b) an affidavit must not contain matter which is scandalous, and/or irrelevant and/or oppressive. "Irrelevant" material includes opinions, conclusions and submissions."

[18] Amongst the portions of the Affidavit of Carlton Martin which appear to comply with the Rules, there is an allegation that Counsel for the Claimant made an "admission" that the Claimant's dealings were with Darville Construction and Property Management Limited and not Darville Wong Realty Limited. I deal with this point in the 'Discussion' below. (See paragraph [26]).

[19] For the purposes of the interlocutory applications under consideration, the Court finds the evidence set forth in the Second Affidavit of Lashan Butler to be compelling. In this

regard, no evidence put forward by the Defendant convincingly trumps that of the Claimant.

Issues

[20] The issues canvassed by the parties for the Court's consideration are:

A. Whether the pleadings of the Claimant ought to be struck out on one or more of the following grounds, namely that:

(1) the Defendant is not a party to the Construction Agreement alleged to have been breached as it is not an entity that can enter into a contract;

(2) there is no cause of action against Darville Wong Realty Limited, which is also not a party to the Construction Agreement alleged to have been breached;

(3) the Construction Agreement was with Darville Construction and Property Management Limited which cannot be used by Darville Wong Realty to do business because Darville Wong Realty has no separate legal personality; or

(4) the Plaintiff's action is frivolous, vexatious and an abuse of the process of the Court.

B. Whether the Claimant's pleadings may be amended to add any or all of :

(1) Darville Wong Realty Limited;

(2) Darville Construction & Property Management Limited; and

(3) Gregory Ndlovu as Defendants in these proceedings.

Discussion

Strike Out Application

[21] Martin Global has represented that it acts for Darville Wong Realty Limited. Darville Wong Realty Limited submits in its interlocutory application that it is not a party to the Construction Agreement. It is clear that the Construction Agreement was entered into by the Claimant and a person or persons (whether natural or artificial) using a single trade name - Darville Wong Realty. One must ask: which entities or persons made use of this trade name to agree, partially perform, receive payment for and terminate the Construction Agreement? A perusal of the Defence filed by Martin Global on behalf of the Defendant reveals at least two things:

(1) that Darville Wong Realty Limited considered itself to be the Defendant notwithstanding the Amended Claim and Statement of Claim were clearly reflective of the trade name Darville Wong Realty as Defendant; and

(2) that Darville Wong Realty Limited admitted in its Defence and Counterclaim, from paragraph 3 thereof and onwards, that it contracted in writing with the Claimant on 26 February 2015 to construct a dwelling home for her at Lot #7 Killarney Shores Subdivision, was paid by the Claimant for some of the stages of construction and at some stage, the transaction was discontinued.

[22] The pleadings in this matter were settled under the old regime, that is, before the implementation of the Supreme Court Civil Procedure Rules, 2022. The Rules of the Supreme Court, Subsidiary Legislation of The Bahamas, Chapter 41 therefore applied at that time. The RSC, and in particular O. 12 r. 6 allowed defendants to apply to set aside a defective writ or defective service of a writ by seeking leave, and if obtained, entering a 'conditional appearance' subsequently to challenge the defects. Further, O. 2 r. 1 and 2 in part provided:

> "1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document judgment or order thereon.
>
> 2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity." [Emphasis added]

[23] Darville Wong Realty Limited, having received service of the original Writ, Amended Writ and Statement of Claim at its registered office on 17 November 2021, and having noted that the Defendant was named as Darville Wong Realty in the Amended Writ and Statement of Claim, took the step of entering a regular memorandum of appearance as opposed to a conditional appearance on 25 November 2021. Roughly one month later, that company then took the further step of entering a positive defence and counterclaim in this action. It failed to seek leave to enter a conditional appearance and then to seek the setting aside of: (1) the claim against Darville Wong Realty or alternatively, (2) irregular service upon the registered office of Darville Wong Realty Limited. In my opinion the actions of Darville Wong Realty Limited in entering a regular appearance, defence and

counterclaim were 'fresh steps' which curtailed it, on application of the principles then prevailing under the RSC, from thereafter applying to set aside the Amended Writ and Statement of Claim.

[24] Putting aside for the moment that application of the RSC which pertained to earlier steps in this action, I observe that the questions now raised in the Defendant's interlocutory application makes the entire relationship of the Defendant and others with the Claimant resemble a game played in shadow. The trade name, Darville Wong Realty was consistently used in the majority of the dealings on behalf of whomever contracted to build the home for Ms Butler coupled with close involvement of Gregory Ndlovu. It is the Court's view that Darville Wong Realty Limited, having unconditionally accepted that it is the Defendant and having admitted it entered into the Construction Agreement, (despite the use of the trade name in the Construction Agreement and in the pleaded action), is now precluded from abandoning that position by way of a strike out.

[25] Further, it is plain that the Claimant deleted the word 'Limited' from any reference to Darville Wong Realty in her amended pleadings, despite the fact she did not mark this change in red ink as complained of by Counsel for the Defendant. The Defendant, Darville Wong Realty Limited in entering an Appearance and Defence and Counterclaim clearly accepted therefore that references to Darville Wong Realty were references to Darville Wong Realty Limited.

[26] Having considered the evidence of the Defendant in this application, there is nothing to show, in contradiction to the Defendant's pleaded case, that Darville Wong Realty Limited or Darville Wong Realty Ltd is not a counterparty to the Construction Agreement operating by the trade name Darville Wong Realty. The Defendant states that the Claimant's Counsel admitted during the trial that the Claimant did not contract with Darville Wong Realty Limited, but rather with Darville Construction and Property Management Limited. Mrs Godet (Counsel for the Claimant) could not give evidence on such matters. Moreover, the Court did not understand Mrs Godet to be denying the involvement of Darville Wong Realty Limited but rather stating that investigations revealed that Darville Construction and Property Management Limited was involved, because that company purported to terminate the construction works for itself and "its partners". Additionally, that 'Darville Wong Realty' was the moniker used by the counterparty (or counterparties) to the Construction Agreement to refer to itself (or themselves). Uncertainty prevailed – and understandably so given the mystery surrounding the question as to which parties are actually Darville Wong Realty. The Court attempted to find out from Mr Martin whether the question was addressed as to who prepared the Construction Agreement which was presented to Ms Butler for her signature. The Court sought affidavit evidence on this point. None was forthcoming. What we do have, however, is a full Defence and Counterclaim filed for the Defendant.

[27] Further, in the pleadings prepared by Martin Global for the Defendant, it is averred that it partially performed and was partially paid for work under the Construction Agreement. The Court notes from the Defendant's Counterclaim that it is admitted in paragraph 30

thereof that the Claimant paid the Defendant for 4 stages of the Construction Agreement which amounted to 65% of the overall payment of $172,000. Therefore, some person or entity using the trade name Darville Wong Realty entered into the Construction Agreement with Lashan Butler, carried out certain works pursuant to that Construction Agreement and received payments from the Claimant's mortgage lenders tendered on her behalf. Darville Wong Realty Limited purports to have performed the work and to be owed for its work, while Darville Construction and Property Management Company purports to have the power to end its services and that of its partners under the Claimant's project.

[28] Turning fully to Darville Construction and Property Management Limited, it is clear that the Claimant has pleaded her case in her Statement of Claim against this entity. However, she included as Defendant in the title of the action only the trade name - Darville Wong Realty – which she believed operated as Darville Construction and Property Management Limited. The Claimant has not changed this position. She stated in paragraph 2 of her Statement of Claim:

> "*The Defendant, Darville Wong Realty, while doing business as "Darville Construction and Property Management Limited", held itself out, and represented to the Plaintiff that it was a qualified and competent Building Contractor.*"

[29] The Defendant's answer to this pleading in paragraph 3 of its Defence is as follows:

> "*The Defendant denies paragraph 2 of the Statement of Claim as it relates to the following in this paragraph. The Plaintiff accepted and executed a contract for the construction of her home with and under the rubric of Darville Wong Realty. The Plaintiff is required to prove the facts alleged in paragraph 2.*"

[30] The Claimant's Second Affidavit refers to a letter of Darville Construction and Property Management Limited dated 1 November 2017 and signed by Gregory Ndlovu. By this letter of 1 November 2017, prima facie, Darville Construction and Property Management Limited purported to have been involved in the Claimant's project with "its partners" and to have the power to terminate its involvement therewith. Absent from the evidence put forward by the Defendant is any fact which tends positively to show that Darville Construction and Property Management Limited had no material part of the transaction for the construction of the Claimant's dwelling home which is the subject of this piece of litigation.

[31] In relation to Gregory Ndlovu, before the Court there are documents, letters and other communications which allegedly bear his signature and/or were conveyed between him (on behalf of Darville Wong Realty and/or Darville Construction and Property Management Limited) and the Claimant, concerning the construction of her dwelling home as agreed upon in the Construction Agreement. Mr Ndlovu admits involvement in

the construction of the Claimant's dwelling home. In fact, in a Witness Statement of Gregory Ndlovu filed on 26 April 2023, which will be presented to be put in evidence at trial, Mr Ndlovu states at paragraph 3:

> "*The Plaintiff did not enter into a contract with Darville Wong Realty Limited or Darville Construction and Property Management Limited. I controlled and managed the construction process with the Plaintiff who took responsibility for purchasing most of the materials and products for her home.*" [Emphasis added].

[32] The Court observes that the earliest date on which the Claimant could have seen the witness statement of Gregory Ndlovu, and therefore be aware of his position, was about one month before the trial was scheduled to start. This witness statement appears to contradict averments in the Defence of the Defendant.

[33] Without a doubt a full investigation of the involvement of persons referred to in the pleadings will be necessary. The Defendant chose to utilize a trade name in the majority of dealings and communication with the Claimant. Therefore, the investigation at trial will naturally include the extent to which any or all of Darville Wong Realty Limited, Darville Construction and Property Management Limited and Gregory Ndlovu are involved in these matters. Given all that is revealed in the evidence and pleadings, the Court cannot rule out the possibility at this stage that this triad of persons all operated in the transaction as Darville Wong Realty.

[34] Counsel for Darville Wong Realty Limited strenuously contends that the Claimant "consciously decided to take action against a non-entity" and that she contracted with a non-entity and now seeks to join defendants who were not a part of the contract. The crux of this contention is that a trade name and not a juridical person is the counterparty to the Construction Agreement and that trade name is stated to be the Defendant in the Claimant's pleadings.

[35] CPR Rule 22.2 contains the rules which govern the manner in which corporations and trade names are used in court process to bring or defend lawsuits. That rule provides in part:

> "22.2 Person carrying on business in another name.
>
> "(1) A claim may be made by or against a person –
>
> (a) carrying on business within the jurisdiction; or
> (b) who was carrying on business within the jurisdiction when the right to claim arose –
> (i) in that person's own name;
> (ii) in that persons's own name followed by the words "trading as X.Y.";
> (iii) as "X.Y." followed by the words "(a trading name)"; or

(iv) as "X.Y." followed by the words "a firm".

[36] Guidance as to the operation of the CPR is given by ***The Caribbean Civil Court Practice 2024, 3rd Edition,*** RELX (UK) Limited, London. The Bahamian CPR 22.2 is identical to CPR 22.2 in the Eastern Caribbean, amongst other territories. Usefully, in Note 20.4 of this text, the Eastern Caribbean Court of Appeal decision in **Deidre Piggott Edgecombe and Nordel Edgecombe v Antigua Flight Training Centre** ANUHCVAP2015/0005 is cited. In that case the respondent entered a default judgment against the appellants for arrears of fees for training. The respondent was named in the pleadings simply as 'Antigua Flight Training Centre', but a company was incorporated in Antigua and Barbuda with the name 'Antigua Flight Training Center Inc.'. The appellants applied to set aside the judgment on the basis of exceptional circumstances under CPR 13.3(2) of the Civil Procedure Rules 2000. The exceptional circumstances were that the respondent as named in the action is not a legal person and does not exist as a matter of law. As such, the appellants contended that the party as named could not bring an action and judgment could not be obtained. At first instance the court refused to set aside the default judgment. The appellant appealed.

[37] The court of appeal dismissed the appeal and stated that it was simply that the respondent did not follow CPR 22.2(1)(b)(iii). The business name used in the pleadings was not followed by the words 'a trading name' so as to indicate that the claim was brought by a person using their trading name. However, the court was of the view that this omission did not thereby render the claim bad in law without more. The court stated:

> "[8] The tenor of these rules leads me ineluctably to the conclusion that the intent and purpose is not to treat a claim brought in a business name only, as an invalid claim or as one which fails ab initio…CPR 8.5(1) is also instructive. It says in effect that as a general rule a claim does not fail due to non-joinder or misjoinder of parties."

[38] In the circumstances, on the pure basis of the argument that Darville Wong Realty is not a juridical person, I am not persuaded that the Claimant's claim is incapable of standing or cannot be amended to rectify omissions of the Claimant. Such defect in constituting parties would not render the action bad in law. In particular, I am not satisfied that the Defendant's bid to strike out the Amended Writ and Statement of Claim can be supported by its argument that the trade name Darville Wong Realty could not be utilized to represent Darville Construction and Property Management Limited in the pleadings without remedy. At this stage, the Court anticipates the proof at trial of these matters and others as averred in the parties' pleadings. As it is, the evidence referred to by the Claimant in her Second Affidavit tends to show significant connections between Darville Wong Realty and the parties she seeks to add in this action, and further their connection to the Construction Agreement.

[39] Counsel for the Defendant argues that the Claimant must satisfy the Court that there is a cause of action or remedy to be had against Darville Wong Realty Limited, Darville Construction and Property Management Limited and Gregory Ndlovu or that the cause of action was established in the pleadings prior to the limitation period coming to an end. Counsel for the Defendant puts the accrual of the cause of action at 12 September 2015 and (in submission) the end of the limitation to bring this action at 11 September 2021, 6 years post the alleged breach. In response, the Claimant argues that the last breach of the Construction Agreement occurred in 2017. The Court notes that it is the Claimant's case that the Defendant repudiated the Construction Agreement on 1 November 2017. This accrual date would put the filing of the claim on 26 February 2021 well within a 6-year limitation period. That repudiation is pleaded in the Statement of Claim. The timing of any alleged breaches of contract, the manner in which they occurred and which parties were involved must be fully investigated at trial so that the Court can be better equipped with the evidence decide which pleaded case is made out and, as such, who will prevail on the issue of limitation and others.

[40] The Defendant further seeks to strike out the Claimant's Amended Writ and Statement of Claim on the basis it is frivolous, vexatious and an abuse of the process of the Court. Reliance is placed on **Part 26.3**, **26.4** and **26.5** of the **Supreme Court Civil Procedure Rules, 2022** ("CPR"). In my view, **Part 26.4** and **26.5** do not apply as there has been no application for or granting of an "unless order" as contemplated by those part of the CPR.

[41] **Part 26.3** of the CPR in part provides:

> "26.3 Sanctions – striking out statement of case.
>
> (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that –
> (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings
> ...".

[42] What is sought to be accomplished by invoking the Court's powers to strike out a case and how those powers should be applied were matters aptly expressed by Conteh CJ (as he then was) in **Belize Telemedia Limited v Magistrate Usher** (2008) 75 WIR 138 thusly:

> "15. An objective of litigation is the resolution of disputes by the Courts through trial and admissible evidence. Rules of Court control the process. These provide for pre-trial and the trial itself. The rules therefore provide that where a party advances a groundless claim or defence, or no defence, it would be pointless and

wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.

"16. An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.

"17. Part 26 on the powers of the Court at case management contains provisions for just such an eventuality. The case management powers conferred upon the Court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil justice in consonance with the overriding objective of the Supreme Court Rules to deal with cases justly as provided in Part 1.1 and Part 25 on the objective of case management.

...

"20. It is important to bear in mind always in considering and exercising the power to strike out, the Court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?

"21. These are always important factors that perforce must attend any consideration in exercising the discretion to strike out or not to strike out a claim. – Walsh v Misseldine (2000) CPLR 201, C.A., cited in *The Caribbean Civil Court Practice* (2008) at Note 23.35; and generally, The White Book 2005, particularly at pp.88 to 92 at para. 3.4.1 and 3.4.2."

[43] At this juncture, the Court is not convinced that the Claimant's Amended Writ of Summons and Statement of Claim ought to be struck out for any of the reasons put forward in the Summons filed on 21 April 2023, the Affidavit of Carlton Martin filed on 26 September 2023 or the Skeleton Arguments of the Defendant dated 29th September 2023. There is at least one Defendant which has answered the claim by appearing in and defending the action. The Court has already opined that it does not consider that the use of a trade name as a defendant makes the case bad at law. Moreover, given the differing positions as to when the cause of action actually accrued, the answers to the issue as to limitation of the action must be clarified with the assistance of hearing and testing the evidence at trial. I cannot now find, therefore, that the claim is statute-barred.

[44] And is this claim unwinnable? I consider the words of Kokaram J (as he then was) in **UTT v Professor Kenneth Julien & Others** CV 2013-00212:

"If a claim discloses some ground for a cause of action, it is not "unwinnable" and should proceed to trial. It may be a weak claim but not necessarily a plain and obvious case that should be struck out."

[45] On the face of it, when the Claimant's pleaded case is considered in light of the Defence and Counterclaim, I cannot say at this stage that the Claimant has a case that collapses before it is tried. She avers that she paid for the construction of a dwelling home which was never completed on time or at all, and that this caused her to sustain the loss and damage particularized in her pleadings. The Defendant has owned that it entered that contract with the Claimant but rests the fault for the failed contract at the Plaintiff's feet and counterclaims for its alleged losses. In my judgment, there is enough of a pleaded case in relation to the Claimant's claim to warrant a test of the parties' positions at trial. Prima facie, such case would entitle her to recover, if proven. The claim cannot be described as unwinnable. In the circumstances, it is my judgment that the Claimant's claim shall not be struck out, but shall stand and proceed to trial.

Adding Defendants / Amending Pleadings

[46] The Claimant, in seeking to withstand the Defendant's latest volley against her case, has applied to amend the Amended Writ and Statement of Claim to join as Defendants Darville Wong Realty Limited, Darville Construction and Property Management Limited and Gregory Ndlovu.

[47] She did not seek to do so until she realized that Darville Wong Realty Limited was going behind its Defence and Counterclaim to attempt to have the Court expunge her claim on the basis that the name used for the Defendant in the pleadings refers to no one and nothing.

[48] It bears recognition that prudence would have advised the Claimant to either state the name of Darville Construction and Property Management Limited (trading as Darville Wong Realty) in the title of the action instead of in the body of the pleadings. However, this is a clear mistake. As for joining Gregory Ndlovu, the Claimant did not know he took responsibility for the management and control of the Construction Agreement's performance to the exclusion of the companies (Darville Wong Realty Limited and Darville Construction and Property Management Limited) until the filing of his witness statement of 26 April 2023. Moreover, prior to becoming aware of this application, the Claimant appeared to have been lulled into thinking Darville Wong Realty Limited would be prepared to answer the claim with parties constituted as they were, for she did not sooner apply to amend the title of the action to include the full name of Darville Wong Realty Limited as a defendant. Of course, had the Defendant followed the procedure then applicable under the RSC (that is, to seek to set aside the Amended Writ or service after

filing a conditional appearance), prior to entering an appearance and defence, these matters over constituting parties could have been aired early in the proceedings.

Limitation and Joinder of parties

[49] The Notice of Application for joinder of defendants pursuant to Parts 19 and 20 of the CPR was foreshadowed at the adjournment of the trial and filed by the Claimant on 5 July 2023. By the Claimant's calculation the limitation period ended on 31 October 2023. The Defendant pleads in its Defence that the limitation period ended on 25 February 2021, but in submissions argues it ended on 11 September 2021.

[50] Part 19.4 of the CPR provides:

> "(1) The Court may add or substitute a party after the end of a relevant limitation period only if the –
>
> (a) addition or substitution is necessary; and
> (b) relevant limitation period was current when the proceedings were started.
>
> "(2) For the purposes of paragraph (1), the addition or substitution of a party is necessary only if the Court is satisfied that –
>
> (a) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;
> (b) …
> (c) The new party is to be substituted for a party who was named in the claim form in mistake for the new party."

[51] The Defendant's chief objections to the application to add or substitute defendants are:

(1) the limitation period of 6 years, beyond which actions based on simple contract shall not be brought, had elapsed before the Claimant applied to join the defendants;

(2) the joinder would be unfair and cause serious prejudice to Darville Wong Realty Limited to join it for a second time after the start of trial and after all case management matters have been completed;

(3) for its application to succeed, the Claimant must satisfy the Court that the addition of parties post case management is necessary because of some change in circumstances.

[52] With the point that, in this case, limitation prevents joinder, I disagree. Mr Martin's description of the breach complained of, though convenient for his client, appears from a reading of the pleadings, to be based on a misconception of the Claimant's case. He

specifically narrows the case to a complaint about a 180-day "estimated" completion time. The matter is not so simple, for the pleadings show the breaches complained of are far broader. Ultimately, the Claimant states that the Construction Agreement was repudiated by Darville Construction and Property Management Limited on behalf of itself and its partners on 1 November 2017; if made out, this would put the limitation period under the Limitation Act somewhere around 31 October 2023. By that date, the Claimant's action had long been brought and this application for joinder of defendants, filed on 5 July 2023, had been made within that statutory time limit. The evidence at trial should reveal the true limitation period. As that matter is as yet unresolved, the argument as to limitation preventing joinder cannot at this time be safely upheld.

[53] Generally, CPR Part 19 governs addition, substitution or removal of a party in proceedings. Part 19 provides in part:

> "19.1 Scope of this Part
>
> "This Part deals with the addition or substitution of parties after proceedings have been commenced.
>
> "19.2 Change of Parties
>
> "(1) The Court may add, substitute or remove a party –
>
> (a) on application by a party; or
>
> (b) without an application.
>
> "(2) A claimant may add a new defendant to proceedings without permission at any time before the case management conference by filing at the court office, an amended claim form and statement of claim.
>
> "(3) …
>
> "(4) The Court may add a new party to proceedings without an application, if –
>
> (a) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or
> (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the Court can resolve that issue.
>
> "(5) …
>
> "(6) The Court may order a new party to be substituted for an existing one if –
>
> (a) the Court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or
> (b) the existing party's interest or liability has passed to the new party.
>
> "(7) The Court may add, remove or substitute a party at the case management conference.

"(8) "The Court may not add a party, except by substitution, after the case management conference on the application of an existing party unless that party can satisfy the Court that the addition is necessary because of some change in circumstances which became known after the case management conference.

"19.3 Procedure for adding and substituting or removing parties

"(1) An application for permission to add, substitute or remove a party may be made by –

(a) an existing party; or
(b) a person who wishes to become a party.

Change in circumstances and Resolution of all matters

[54] In this matter, the Claimant has applied to add parties after the case management conference. For the application to succeed, there must have been a change in circumstances which necessitates the joinder and became known only after the case management conference which took place in October 2022. The Defendant has advanced this argument and submits that there is no change in circumstances pursuant to **CPR 19.2(8)** and, as such, the Claimant's application must fail. However, neither party has addressed the Court's power acting on its own motion (that is, without an application by an existing party) to add a party at such an advanced stage in proceedings under **CPR 19.2(1)(b)**.

[55] The issue as to what 'change in circumstances' will warrant the addition of a party post case management has been considered. **CPR Part 19.2(7)** of the **Civil Proceedings Rules 1998** of the Republic of Trinidad and Tobago is similarly worded to the Bahamian CPR 19.2(8). In **Allan Dick and Company Limited (Improperly sued as Allan Dick and Company) v Fast Freight Forwarders Limited and Allan Dick and Company (Trinidad and Tobago) Limited [in liquidation],** Civil Appeal No 214 of 2010, the Court of Appeal of Trinidad and Tobago reviewed an order of the court below by which that court refused to set aside its order joining the appellant as a defendant in the claim after the case management conference had taken place. The court of appeal dismissed the appeal, finding in part that the voluntary liquidation of the defendant well after case management was a change in circumstances which warranted that the party be added. The court opined that the winding up of the defendant could be construed as an attempt to evade or make more difficult the enforcement of any judgment that might be obtained against it. As to what 'some change in circumstances' in **CPR 19.2 (7)** may involve, the court stated:

> "49. It is clear that the rule applies only to the addition of a party as opposed to a substitution, and that under the rule, a precondition to the Court exercising its discretion to add a party after the case management conference is that there must be a change in circumstances becoming known thereafter that made the addition of the party necessary.

"50. A change in circumstances refers to a change in the factual circumstances. It does not refer to a change or alteration in instructions to a party's attorney or a change in the party's or his attorney's awareness or understanding of the party's legal rights. The relevant date of the change is the date on which the change in circumstances becomes known to the party applying to add the party and not the date on which the change in circumstances becomes part of the instructions to the party's existing or newly appointed attorney."

[56] In light of its Defence and Counterclaim filed on 21 December 2021, Darville Wong Realty Limited's application to strike out the claim on the basis that Darville Wong Realty is a non-entity and that no one is effectively sued, was filed roughly one (1) month before the trial. This is certainly an about-face which took place some 7 months after case management and it was never raised in the Case Management Conference, but only at the Pre-trial Review (about 14 days before the scheduled start of the trial). The move by the Defendant seems at sharp odds with the position it perpetuated by filing the unconditional Memorandum of Appearance, Defence and Counterclaim which all indicated that it is the party which contracted with the Claimant, and is therefore in substance, the Defendant. However, in my view, it is doubtful this qualifies as a change in circumstances as contemplated by the Rules. It is a legal objection taken by a party who has entered a Defence, but the legal objection is taken without a withdrawal of the Defence and Counterclaim. The Claimant has not satisfied the Court that there is a change in circumstances pursuant to **CPR 19.2(8)** by which the Court would permit, upon her application, the joinder of parties to the action post case management.

[57] Nothwithstanding the lack of clear qualifying events which constitute a change in circumstances, as mentioned above, I am of the view that the Court has a discretion to join parties at any time without having regard to an application of an existing party or any prospective party. **CPR 19.2(1)** allows a Court to add, substitute or remove a party to proceedings with or without an application. By this provision, the Court may exercise its power of its own initiative and in so doing there is no fetter as to when it may do so. However, the Court must be satisfied that any of the criteria contained in **CPR 19.2(4)(a)** or **19.2(4)(b)** are met. That is, either that it is desirable to add the new party so that the Court can resolve all matters in dispute in the proceedings; or that there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the Court can resolve that issue.

[58] In **Patricia J Masson v Andrea Jeanette Simpson (In her capacity as Personal Representative of the Estate of Egbert Wilfred Simpson)**, Claim No CV2016-02738, delivered in March 2024 by Mohammed J in the High Court of the Republic of Trinidad and Tobago, the court exercised its discretion to add parties post case management, having regard to CPR Part 19 of the Trinidadian Civil Proceedings Rules 1998. In the context of a claim for inter alia setting aside two Grants of Letters of Administration and a Deed of Assent, the court had to decide whether to join persons as defendants after case

management. In considering the circumstances of the case before him, Mohammed J found that the joinder of the sons of the defendant was necessary to resolve the issue of account and to ensure that any order made by the court would bind the parties. The court therefore exercised its discretion to add defendants after the case management conference. Mohammed J stated:

> "[66] In **Savitre Lochan v Keith Farfan and Republic Finance and Merchant Bank Limited** CV2008-02015, Rampersad J held that all the necessary parties to an action must be named, especially where a party's rights may be affected by a pronouncement of the Court…
>
> "[67] When **Savitre** came up for appeal the Court of Appeal had to determine whether it was necessary to join a party and the impact of the non-joinder on the proceedings. The panel found that CPR Rule 11.4 (application to be made in writing) should be read in conjunction with CPR Rule 19.5 (procedure for adding and substituting parties with or without an application). It held that a court can act on its own motion and add a party. The panel later considered that to join a party at that advanced stage would increase litigation expenses and also considered the court's resources.
>
> "[68] In **Anthony Murray v Dorothy Vierra**, Procedural Appeal No. 143 of 2011, Narine J.A. opined that on a proper construction of CPR Rules 19.5(1) and 19.2(7) the court has a discretion to add or substitute a party with or without an application by an existing party in the interest of resolving all matters in dispute before it."

[59] In this analysis, it is helpful to take a closer look at the Trinidadian Court of Appeal case of **Anthony Murray v Dorothy Vierra**, Procedural Appeal No. 143 of 2011. In that claim a personal representative (DV) and beneficiaries of the Estate of Clyde Vierra (DV and LD) sued another personal representative (AM), whose grant was eventually revoked, for an account of AM's dealings with the Estate and payment of proceeds of sale of properties therein, amongst other reliefs. It was alleged that without the approval of DV and LD, AM as personal representative of the Estate, inter alia conveyed some of its properties to companies which he owned or controlled and failed to distribute proceeds of sale of properties of the Estate. DV, having brought the action against AM in her capacity as a beneficiary before she obtained a grant of letters of administration, did not subsequent to obtaining the grant, have herself added as a personal representative. A pre-trial review was fixed for 22 March 2011. Later DV brought an action as legal personal representative of the Estate against Sandpiper Resorts Limited and Republic Bank Limited in respect of the conveyance of some of the properties of the Estate by AM. Eventually, both actions against AM and Sandpiper Resorts Limited and Republic Bank Limited were consolidated. AM and Sandpiper Resorts Limited sought to strike out the claim on the basis that it disclosed no cause of action.

[60] The trial judge ordered that: (1) the claims in relation to some of the properties (named in the judgment) shall continue, and that others (named in the judgment) be struck out, (2) that the pleadings be amended to reflect the continuation and/or striking out ordered, and (3) costs of the application be borne equally by the parties. AM and others appealed and DV and LD cross-appealed. It was argued on behalf of AM (and others) that the action could not be maintained because the legal personal representative was not a party to it. Further, AM (and others) contended that DV could not now be added or substituted as legal personal representative. In response for DV and LD it was contended that there are special circumstances in which an action by beneficiaries can be maintained without legal personal representatives being a party, but if the court opined that DV ought to be a party as legal personal representative, the CPR permitted her to be added or substituted in such capacity.

[61] The court of appeal (the decision delivered by Narine JA with which Weekes JA and Soo Hon JA agreed) decided that DV in her capacity as legal personal representative ought to be a party to the action for the purposes of determining all matters in dispute between the parties and that the action could not be maintained without the legal personal representative being a party. On the issue of joinder the court of appeal cited CPR 19.5(1) of the Trinidadian Civil Proceedings Rules 1998, by which the court is empowered to add, substitute or remove a party to proceedings with or without an application. This is the equivalent of the Bahamian CPR 19.2(1)(a) and (b). The court of appeal also cited the Trinidadian CPR 19.2(3) which sets out criteria for adding a new party to proceedings, briefly where the same is desirable for the purposes of resolving all matters in dispute. This is equivalent to the Bahamian CPR 19.2(4)(a) and (b). The court of appeal also referred to CPR 19.2(7) which, on the application of an existing party for adding parties post case management, the applicant must show a change in circumstances which necessitates the joinder. This is identical to the Bahamian CPR 19.2(8).

[62] On the issue of joinder of parties, Narine JA stated:

> "22. The next issue is whether Dorothy in her capacity as Legal Personal Representative can be joined as a party at this stage of the proceedings.
>
> "23. The question of joinder of parties is dealt with in Part 19 of the Civil Proceedings Rules 1998…Part 1 of the Civil Proceedings Rules sets out the overriding objective of the rules that is to enable the Court to deal with cases "justly". Rule 1.2 provides that the court must seek to give effect to the overriding objective when it:
>
> (1) Exercises any discretion given to it by the Rules.
>
> (2) Interprets the meaning of any rule.
>
> **"24. It is clear that the Court has the discretion under Part 19.5 to add or substitute or remove a party with or without an application. In other words it has a discretion to add or substitute a party of its own motion. This is hardly**

surprising, since the underlying philosophy of the Civil Proceedings Rules is that the process of litigation is court driven and no longer relies on the parties alone to take procedural steps. In considering whether to use its discretion under Rule 19.5(1), the court must be guided by the overriding objective, by the provisions of R. 19.3 and by Rule 19.2 (3), which gives the court a discretion to add a new party so that it can resolve all the matters in dispute in the proceedings. Similarly, the court has a discretion to substitute a party under R 19.2 (5) if by doing so it can resolve more effectively the matters in dispute.

"25. It is significant in my view, that the wording in R 19.2 (3), 19.2 (4) and 19.2 (5) makes no mention of the Court's exercise of its discretion to add or substitute a party on the application of an existing party. Rule 19.2 (7), however, expressly provides that where an application is made by an existing party to add a new party after a case management conference, that party must satisfy the court that there has been a change of circumstances which became known after the case management conference. As Mr Mendez has observed, R 19.2 (7) refers to applications to add a party only, as opposed to applications to substitute a party.

"26. In any event, having regard to the clear language of the rules referred to above, the court with or without an application by an existing party, has a discretion to add or substitute a party in the interest of resolving all matters in dispute before it.

"27. Mr Mendez has submitted, with reference to Rule 19.2(7), that there has been a change of circumstances in that the first appellant, not having taken up the issue of Dorothy's capacity, for some ten years, has now had a change of attitude, and has decided to raise the issue. This change of attitude, Mr Mendez submits, constitutes a change of circumstances for the purposes of satisfying the requirements of R 19.2 (7). I find no merit in this submission. A party to an action is entitled to raise a legal objection or issue at any stage, provided that it is well founded in law and on the facts.

...

"37. In the result, the appeal is dismissed. The respondent's cross appeal is allowed. The order of the judge made on 28th June 2011 is set aside. **I order that Dorothy Vierra be added as a claimant in CV 2010-3679 in her capacity of Legal Personal Representative and I grant leave to the parties to amend the Writ of Summons and pleadings to reflect this addition.** The appellants will pay the respondents' costs in the Court below...". (Emphasis added).

[63] In the result, CPR Part 19.2(8) calls for a demonstration of 'some change in circumstances' post case management to substantiate an application for joinder of parties before the Court, but this does not affect the Court's powers where it decides the matter on its own initiative. This Court requires, and holds as paramount, the resolution of all matters before it. To the achievement of that end, I consider the joinder of Darville Wong Realty Limited, (a company which has accepted it contracted with the Claimant), is desirable so that the Court can resolve all matters in dispute in the proceedings. The role of that entity in these proceedings is plainly spelt out in its Defence and Counterclaim. As well, the material before the Court reveals the involvement of Darville Construction and Property Management Limited and Gregory Ndlovu. As such, for the purpose of resolving all issues in these proceedings, the Court of its own motion, exercises its discretion to add the necessary parties as defendants.

[64] Since the case against Darville Wong Realty was substantially answered by Darville Wong Realty Limited, it ought to be joined as a defendant to the action with a notation: "(trading as Darville Wong Realty)". The claim comes as no surprise to Darville Wong Realty Limited and there is no or no appreciable prejudice it will suffer as a result of this amendment, for despite its latest position, it has long gone all-in with its Defence and Counterclaim. Moreover, in all the circumstances, I do not find convincing the argument that this entity will be deprived of a fair hearing pursuant to the Constitution if it is joined.

[65] The case against Darville Construction and Property Management Limited has been substantially pleaded by the Claimant. It is the entity which, as alleged by the Claimant, took on the responsibility to repudiate the Construction Agreement on its behalf and that of its partners. This entity has not been formally served, but if the Claimant is correct about the limitation period, this action and her application for joinder were both brought when the limitation period was current.

[66] I consider that this claim cannot properly be carried on by or against Darville Wong Realty Limited and all issues fully aired unless the party which allegedly repudiated the Construction Agreement for itself and its partners be joined by substitution. I also consider that if the Claimant prevails, there would likely be orders made which affect the rights of Darville Construction and Property Management Limited. As such, it ought to be substituted for Darville Wong Realty in order to be heard on the issues. Specifically, in place of Darville Wong Realty, Darville Construction and Property Management Limited (also trading as Darville Wong Realty) should be substituted pursuant to CPR Part 19.2(1) and/or CPR Part 19.2(6)(a) and/or CPR Part 19.2(8). The Claimant intended to sue this entity as stated in paragraph 2 of her Statement of Claim, and obviously made a mistake as to the manner in which she referred to the party in the title to the action.

[67] By his witness statement, Gregory Ndlovu states that he was in control of and managing the construction under the Construction Agreement and denies that the Claimant had a

contract with either Darville Wong Realty Limited or Darville Construction and Property Management Limited. Having thus claimed key responsibility in the affairs pursuant to the Construction Agreement, and in circumstances where the roles of the prospective defendants are thus far opaque, the Court is of the view that it is necessary that Mr Ndlovu be made a party to these proceedings as well. He will certainly not be surprised as he is well aware of the existence of the claim. He ventures to give evidence in the case and, by the same, professes a key role in the dealings which paved the path to this claim, to the exclusion of the companies the Claimant seeks to join.

Disposition

[68] The Court is mindful of its overriding objective to deal with cases justly. I see no reason why the addition of these parties would fundamentally alter the nature of the existing claim. I acknowledge that the outcome of these applications shall increase costs and court time. However, a balance must be struck. In my judgment, having regard to the circumstances, the law and the intrinsic justice of this case, joining those who have participated in the Construction Agreement is preferable and outweighs dismissing the Claimant's case or refusing to add appropriate and necessary parties. Accordingly, the Court refuses the application to strike out the pleadings of the Claimant and allows the following:

(1) the addition of Darville Wong Realty Limited (doing business as Darville Wong Realty);
(2) the substitution of Darville Construction and Property Management Limited (also doing business as Darville Wong Realty) for the trade name Darville Wong Realty; and
(3) the addition of Gregory Ndlovu.

[69] Consequently, leave is granted to the parties to amend the Amended Writ of Summons and the pleadings in this matter to reflect the Defendants as ordered to be joined. The Court shall hear the parties as to the appropriate costs order in these applications.

Dated 24 February 2025

Simone I. Fitzcharles

Justice